MAJLIS PERBANDARAN PULAU PINANG

v.

LEMBAGA RAYUAN NEGERI PULAU PINANG & ANOR

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
ABDUL AZIZ MOHAMAD JCA
MOHD GHAZALI YUSOFF JCA
[CIVIL APPEAL NO: P-01-45-2002]
14 NOVEMBER 2005

ADMINISTRATIVE LAW: *Exercise of administrative powers - Judicial review - Appeal Board allowing appeal by property developer against direction of local planning authority - Whether direction appealable – Whether Appeal Board had jurisdiction to hear appeal - Town and Country Planning Act 1976, s. 23(1)*

The 2nd respondent (a property developer) had applied to the appellant (the local planning authority for Pulau Pinang) for planning permission to carry out certain work relating to the demolition of an existing building and for the construction of a 20-storey building on that site. Upon the appellant's request to amend and re-submit the amended plans, the 2nd respondent's architect returned to the appellant a set of amended layout plans with a fresh proposal to demolish the existing building and to construct a 24-storey building. The appellant responded by requiring the 2nd respondent to preserve the existing building and to construct the new building in its vicinity. This direction of the appellant was given under s. 21(3)(g) of the Town and Country Planning Act 1976 ('the Act'). The 2nd respondent then, pursuant to s. 23 of the Act, appealed to the 1st respondent (the Appeal Board established under s. 36 of the Act). At the hearing of the appeal, the appellant raised a preliminary objection, arguing that the 1st respondent had no jurisdiction to hear the appeal because the appellant's direction given as aforesaid was not an appealable decision. The 1st respondent overruled the objection; thereafter, the appellant moved the High Court for judicial review which that court declined. Hence, the present appeal by the appellant.

Held (allowing the appeal and setting aside the High Court's orders) Per Gopal Sri Ram JCA delivering the judgment of the court:

[1] The 1st respondent's power to hear appeals is only where the appellant grants planning permission either absolutely or subject to such conditions as it thinks fit to impose, or refuses to grant planning permission. Other acts by the appellant done or omitted to be done are not appealable. The right of appeal is not a common law right either as a matter of private or public law. It is a creature of statute; if it is not given then it does not exist. And once given, it is a substantive and not a mere procedural right. (p 890 c-d)

[2] It would appear that the High Court found against the appellant principally on the ground that there was a hiatus in s. 23(1) of the Act. The section has been purposely cast in the way it has to avoid the 1st respondent being bogged down with appeals against all the directions which the appellant has to give in the course of carrying out its business. If Parliament intended for there to be a right of appeal against decisions made or directions given under other provisions of the Act, it would have said so expressly. It is no function of a court, save in very exceptional circumstances, to supply omissions in a statute. The High Court, thus, had embarked upon an exercise of unauthorised legislation. (p 890 e-g)

[3] Decisions, directions, acts and omissions of the appellant falling outside the immediate scope of s. 23(1) of the Act may be made the subject matter of judicial review in the ordinary way. So, the 2nd respondent was not without recourse. In the present case, it should have sought judicial review and not proceeded by way of appeal. (p 890 h)

[4] Since the direction given by the appellant was not appealable, it followed that the 1st respondent could not hear the appeal. The High Court, therefore, ought to have quashed the decision of the 1st respondent on the jurisdictional point. (p 891 e)

*[**Bahasa Malaysia** Translation Of Headnotes*

Responden kedua (pemaju hartanah) telah memohon kepada perayu (pihak berkuasa perancangan bagi Pulau Pinang) untuk permit perancangan bagi memulakan kerja-kerja berkaitan perobohan sebuah bangunan sedia ada dan pembinaan sebuah bangunan 20 tingkat di tapak tersebut. Ekoran permintaan perayu supaya perubahan dan permohonan semula dibuat bagi pelan terpinda, arkitek responden kedua telah mengembalikan kepada perayu se set pelan rangka yang dipinda beserta dengan cadangan baru bagi merobohkan bangunan sedia ada dan pembinaan bangunan setinggi 24 tingkat. Perayu membalas

dengan meminta supaya responden kedua mengekalkan bangunan sedia ada dan membina bangunan baru berdekatan dengannya. Arahan perayu ini diberi di bawah s. 21(3)(g) Akta Perancangan Bandar dan Desa 1976 ('Akta'). Berikutnya, selaras dengan peruntukan s. 23 Akta, responden kedua merayu kepada perayu pertama (Lembaga Rayuan yang ditubuh di bawah s. 36 Akta). Di pendengaran rayuan, perayu membangkitkan bantahan awal bahawa responden pertama tiada bidang kuasa untuk mendengar rayuan, kerana arahan seperti yang diberi perayu di sini bukanlah suatu keputusan yang boleh dirayui. Responden pertama menolak bantahan awal; berikutnya perayu memohon kepada Mahkamah Tinggi untuk kajian semula kehakiman, tetapi permohonan itu juga ditolak oleh mahkamah tersebut. Perayu dengan itu merayu seterusnya.

Diputuskan (membenarkan rayuan dan mengenepikan perintah Mahkamah Tinggi)
Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah:

[1] Kuasa responden pertama untuk mendengar rayuan hanya wujud bilamana perayu mengeluarkan permit perancangan sama ada secara mutlak atau dengan syarat-syarat yang difikirkan sesuai olehnya untuk dikenakan, atau jika ia enggan mengeluarkan permit perancangan tersebut. Lain-lain perlakuan atau peninggalan perayu adalah tidak boleh dirayui. Hak untuk merayu ini bukanlah suatu hak common law, sama ada yang berbentuk hak persendirian ataupun awam. Ia sebaliknya adalah ciptaan statut; jika tidak diberi maka ia tidak wujud. Dan sebaik diberi, ia menjadi suatu hak substantif dan tidak semata-mata hak prosedural.

[2] Dalam membuat keputusan yang berpihak kepada perayu, Mahkamah Tinggi nampaknya bersandar kepada alasan pokok bahawa terdapat suatu lompang pada s. 23(1) Akta. Seksyen ini digubal sebegitu rupa bagi mengelakkan responden pertama dari dibebani dengan rayuan-rayuan, dalam ertikata tidak semua arahan-arahan yang dibuat oleh perayu ketika melaksanakan tanggungjawabnya boleh dirayu kepada responden pertama. Jika Parlimen berniat bahawa rayuan boleh dibuat di bawah peruntukan-peruntuan lain Akta terhadap keputusan-keputusan dan arahan-arahan perayu, maka ia tentunya akan mengatakan begitu dengan jelas. Bukanlah menjadi tugas mahkamah, kecuali dalam keadaan-keadaan yang sangat istimewa, untuk memenuhi peninggalan-peninggalan di dalam statut. Oleh itu Mahkamah Tinggi telah melakukan penggubalan undang-undang secara yang tidak diizinkan.

[3] Segala keputusan, arahan, perbuatan dan peninggalan perayu yang terkeluar dari skop terhad s. 23(1) Akta mungkin boleh tertakluk kepada kajian semula kehakiman dengan cara biasa. Jadi, responden kedua bukanlah tidak mempunyai remedi. Dalam kes semasa, ia seharusnya memilih kajian semula kehakiman, dan bukannya rayuan.

[4] Oleh kerana arahan yang diberikan perayu tidak boleh dirayui, ianya mengikut bahawa responden pertama tidak boleh mendengar rayuan. Mahkamah Tinggi, dengan itu, sepatutnya membatalkan keputusan responden pertama berdasarkan persoalan bidang kuasa.

Case(s) referred to:
Chandrasegaran v. AL Annamalai [2004] 2 CLJ 807 CA ***(refd)***
Chellapah v. Malayan Railway Administration [1948-49] MLJ Supp 173 ***(refd)***
Lee Chow Meng v. PP [1978] 2 MLJ 36 ***(refd)***
Lim Phin Khian v. Kho Su Ming [1996] 1 CLJ 529 FC ***(refd)***
Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan [1999] 3 CLJ 65 FC ***(foll)***

Legislation referred to:
Town and Country Planning Act 1976, ss. 21(3)(g), 22(3), 23(1), 36

For the appellant - Gurbachan Singh (Lourdunathan Andrew with him); M/s Andrew & Co
For the respondents - Soffian Ahmad Kassim
- Agnes Tan Keng Sim; M/s Balasundram & Co

[Appeal from High Court, Pulau Pinang; Originating Motion No: 25-116-1997]

Reported by Suresh Nathan

JUDGMENT

Gopal Sri Ram JCA:

This is a case concerning the judicial review of administrative action. Among other things, it involves the interpretation of certain sections in the Town and Country Planning Act 1976 ("the Act"). The appellant is the local planning authority for Pulau Pinang. Section 22(3) of the Act empowers it to make certain decisions. The first respondent is the Appeal Board established under s. 36 of the Act. Section 23 of the Act vests jurisdiction in the first respondent to hear appeals against decisions made pursuant to s. 22(3). On 30 December 1993, the 2nd respondent which is a property developer applied to the appellant for planning permission to carry out certain work. The work related to the demolition of an existing building and for the construction of a 20 storied building on that site.

On 26 April 1994, the appellant wrote to the 2nd respondent. It directed the 2nd respondent to amend the plans it had submitted and to re-submit the amended plans. This request was prompted by the comments the appellant had received from some of its planning departments. In its letter, the appellant also informed the 2nd respondent that if the amended plans were not submitted within three months, the original application would be deemed as withdrawn.

On 21 February 1995, that is to say, after the expiry of the three months specified by the appellant, the 2nd respondent's architect returned to the appellant a set of amended layout plans with a fresh proposal to demolish the existing building and the construction of a 24 storied building. The appellant responded by requiring the 2nd respondent to preserve the existing building and to construct the new building in its vicinity. This direction of the appellant was given under s. 21(3)(g) of the Act. About this there is no dispute.

The 2nd respondent then appealed to the 1st respondent against the aforesaid direction. The appeal was lodged pursuant to s. 23 of the Act. At the hearing of the appeal the appellant raised a preliminary objection as to jurisdiction. It argued that the 1st respondent had no jurisdiction to hear the appeal because the appellant's direction given as aforesaid was not an appealable decision. The 1st respondent overruled the objection. Thereafter the appellant moved the High Court for judicial review which that court declined. The appellant then appealed to us. The appeal was allowed and the appropriate orders, to which I will refer later, were made.

In order to appreciate the reasoning I propose to embark upon, it will be useful if I set out the relevant provisions of the Act. These are as follows:

> 21. (1) An application for planning permission in respect of a development shall be made to the local planning authority and shall be in such form and shall contain such particulars and be accompanied by such documents, plans, and fees as may be prescribed.
>
> (3) Where the development involves the erection of a building, the local planning authority may give written directions to the applicant in respect of any of the following matters, that is to say:
>
> …
>
> (g) any other matter that the local planning authority considers necessary for purposes of planning.
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> (4) The applicant to whom any written directions are given under subsection (3) shall amend the plan submitted with his application accordingly and resubmit the plan within such period or extended period as the local planning authority may specify.

(5) If the plan is not resubmitted within the specified period or extended period, the application for planning permission shall be deemed to have been withdrawn but the applicant may submit a fresh application.

22(3) After taking into consideration the matters specified in subsection (2), the local planning authority may, subject to subsection (4), grant planning permission either absolutely or subject to such conditions as it thinks fit to impose, or refuse to grant planning permission.

23(1) An appeal against the decision of the local planning authority made under subsection 22(3) may be made to the Appeal Board within one month from the date of the communication of such decision to him …

You will see at once that the 1st respondent's power to hear appeals is only where the appellant grants planning permission either absolutely or subject to such conditions as it thinks fit to impose, or refuses to grant planning permission. Other acts by the appellant done or omitted to be done are not appealable.

Now, the right of appeal is not a common law right either as a matter of private or public law. It is a creature of statute. If it is not given then it does not exist. And once given, it is a substantive and not a mere procedural right. Support for these propositions may, if sought, be found in *Chandrasegaran v. AL Annamalai* [2004] 2 CLJ 807, *Lee Chow Meng v. Public Prosecutor* [1978] 2 MLJ 36 and *Lim Phin Khian v. Kho Su Ming* [1996] 1 CLJ 529.

It would appear that the High Court found against the appellant principally on the ground that there was a hiatus in s. 23(1) of the Act. With respect I disagree. The section has been purposely cast in the way it has to avoid the 1st respondent being bogged down with appeals against all the directions which the appellant has to give in the course of carrying out its business. If Parliament intended for there to be a right of appeal against decisions made or directions given under other provisions of the Act it would have said so expressly. It is no function of a court, save in very exceptional circumstances as were present in *Chellapah v. Malayan Railway Administration* [1948-49] MLJ Supp 173, to supply omissions in a statute. In my respectful judgment, the High Court in the present case embarked upon an exercise of unauthorised legislation. I think that the High Court was concerned that someone in the position of the 2nd respondent would be remediless if there was no provision for an appeal. This is an error. Decisions, directions, acts and omissions of the appellant falling outside the immediate scope of s. 23(1) of the Act may be made the subject matter of judicial review in the ordinary way. So, the 2nd respondent was not without recourse. In the present case it should have sought judicial review and not proceeded by way of appeal.

I would add for good measure that the case of *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 CLJ 65, referred to us by the appellant fairly supports its case. There Edgar Joseph Jr FCJ said this:

> Dr Das, for the Council, submitted that the Society's letter dated 10 August 1993 praying for a review of the Council's decision imposing the disputed decision was not an appeal under s. 23, read with s. 24(5) of the Act, to the Appeal Board constituted under s. 36, and indeed, Mr Sethu for the Society himself submitted that the refusal by the Council to reconsider its decision to impose the disputed condition was not appealable under s. 23, read with s. 24(3) of the Act which provides that an appealable decision would be one granting or refusing planning permission or imposing a disputed condition. In our view, both these submissions by Dr Das and Mr Sethu are plainly correct.

The position in the present case is analogous to that which obtained in the *Sungai Gelugor* case. As such, I find this court to be bound to follow that decision. Learned counsel attempted to distinguish the *Sungai Gelugor* case but to no avail. He also sought to argue that the passage relied on by the appellant was not open to the interpretation suggested by the appellant. With respect, I cannot agree.

Since the direction given by the appellant is not appealable, it follows that the 1st respondent could not hear the appeal. The High Court ought therefore to have quashed the decision of the 1st respondent on the jurisdictional point.

For the reasons already given the appeal was allowed and the orders of the High Court were set aside and an order in terms of the appellant's motion was made, save that no order as to costs was made in respect of the 1st respondent here and below. The 2nd respondent was ordered to pay all the costs incurred here and in the court below. The deposit was ordered to be refunded to the appellant. As I have already said, the 2nd respondent is not without other remedy.

My learned brothers Abdul Aziz bin Mohamad and Mohd Ghazali bin Mohd Yusoff, JJCA have seen this judgment in draft and have expressed their agreement with it.